

## § 219.105

body fluid sample or samples when required to by the railroad under a mandatory provision of this part, the employee shall be subject to follow-up testing as specified in this section. Such testing shall be for controlled substances, but may include testing for alcohol as well, if the substance abuse professional determines that alcohol testing is necessary for the particular employee.

(2) If the employee has been determined to have violated a prohibition of § 219.101 regarding possession or misuse of alcohol, or if the employee refused to provide breath when required to by the railroad under a mandatory provision of this part, the employee shall be subject to follow-up testing as specified in this section. Such testing shall be for alcohol, but may include testing for controlled substances as well, if the substance abuse professional determines that drug testing is necessary for the particular employee.

(f) The railroad shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with alcohol or controlled substances misuse does not refer the employee to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(1) A public agency, such as a state, county, or municipality;

(2) The railroad or a person under contract to provide treatment for alcohol problems on behalf of the railroad;

(3) The sole source of therapeutically appropriate treatment under the employee's health insurance program; or

(4) The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

(g) Railroad compliance with the provisions of paragraphs (a), (d), and (e) of

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this section is mandatory beginning on January 1, 1995.

[54 FR 53259, Dec. 27, 1989; 55 FR 22793, June 4, 1990, as amended at 59 FR 7459, Feb. 15, 1994; 62 FR 63466, Dec. 1, 1997]

### **§ 219.105 Railroad's duty to prevent violations.**

(a) A railroad may not, with actual knowledge, permit an employee to go or remain on duty in covered service in violation of the prohibitions of § 219.101 or § 219.102. As used in this section, the knowledge imputed to the railroad shall be limited to that of a railroad management employee (such as a supervisor deemed an "officer," whether or not such person is a corporate officer) or a supervisory employee in the offending employee's chain of command.

(b) A railroad must exercise due diligence to assure compliance with § 219.101 and § 219.102 by each covered employee.

### **§ 219.107 Consequences of unlawful refusal.**

(a) An employee who refuses to provide breath or a body fluid sample or samples when required to by the railroad under a mandatory provision of this part shall be deemed disqualified for a period of nine (9) months.

(b) Prior to or upon withdrawing the employee from covered service under this section, the railroad shall provide notice of the reason for this action, and the procedures described in § 219.104(c) shall apply.

(c) The disqualification required by this section shall apply with respect to employment in covered service by any railroad with notice of such disqualification.

(d) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(e) Upon the expiration of the 9-month period described in this section, a railroad may permit the employee to return to covered service only under the same conditions specified in § 219.104(d), and the employee shall be

subject to follow-up tests, as provided by that section.

[59 FR 7460, Feb. 15, 1994]

### Subpart C—Post-Accident Toxicological Testing

#### § 219.201 Events for which testing is required.

(a) *List of events.* Except as provided in paragraph (b) of this section, post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraphs (a) (1) through (4) of this section:

(1) *Major train accident.* Any train accident (*i.e.*, a rail equipment accident involving damage in excess of the current reporting threshold, \$6,300 for calendar years 1991 through 1996, \$6,500 for calendar year 1997, and \$6,600 for calendar year 1998) that involves one or more of the following:

- (i) A fatality;
- (ii) Release of hazardous material lading from railroad equipment accompanied by—
  - (A) An evacuation; or
  - (B) A reportable injury resulting from the hazardous material release (*e.g.*, from fire, explosion, inhalation, or skin contact with the material); or
  - (iii) Damage to railroad property of \$1,000,000 or more.

(2) *Impact accident.* An impact accident (*i.e.*, a rail equipment accident defined as an "impact accident" in § 219.5 of this part that involves damage in excess of the current reporting threshold, \$6,300 for calendar years 1991 through 1996, \$6,500 for calendar year 1997, and \$6,600 for calendar year 1998) resulting in—

- (i) A reportable injury; or
- (ii) Damage to railroad property of \$150,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

(4) *Passenger train accident.* Reportable injury to any person in a train accident (*i.e.*, a rail equipment accident involving damage in excess of the current reporting threshold, \$6,300 for calendar years 1991 through 1996, \$6,500 for calendar year 1997, and \$6,600 for calendar year 1998) involving a passenger train.

(b) *Exceptions.* No test shall be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing. No test shall be required in the case of an accident/incident the cause and severity of which are wholly attributable to a natural cause (*e.g.*, flood, tornado or other natural disaster) or to vandalism or trespasser(s), as determined on the basis of objective and documented facts by the railroad representative responding to the scene.

(c) *Good faith determinations.* (1)(i) The railroad representative responding to the scene of the accident/incident shall determine whether the accident/incident falls within the requirements of paragraph (a) of this section or is within the exception described in paragraph (b) of this section. It is the duty of the railroad representative to make reasonable inquiry into the facts as necessary to make such determinations. In making such inquiry, the railroad representative shall consider the need to obtain samples as soon as practical in order to determine the presence or absence of impairing substances reasonably contemporaneous with the accident/incident. The railroad representative satisfies the requirement of this section if, after making reasonable inquiry, the representative exercises good faith judgement in making the required determinations.

(ii) The railroad representative making the determinations required by this section shall not be a person directly involved in the accident/incident. This section does not prohibit consultation between the responding railroad representative and higher level railroad officials; however, the responding railroad representative shall make the factual determinations required by this section.

(iii) Upon specific request made to the railroad by the Associate Administrator for Safety, FRA (or the Associate Administrator's delegate), the railroad shall provide a report describing any decision by a person other than the responding railroad representative with respect to whether an accident/incident qualifies for testing. This report shall be affirmed by the decision maker and shall be provided to FRA within 72